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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES R. AUSTIN, Plaintiff and Appellant, v. WINSTON KEVIN MCKESSON et al., Defendants and Respondents.	B280851 Los Angeles County Super. Ct. No. BC575988

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Keosian, Judge. Affirmed.

James R. Austin, in pro. per., for Plaintiff and Appellant.

Stefon A. Jones, for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant James R. Austin sued defendants and respondents Winston Kevin McKesson and the Law Office of Winston Kevin McKesson (collectively, McKesson), retained counsel who represented him at trial in a criminal case. Austin, who represented himself below and does so in this appeal, asserted breach of contract and fraud claims concerning McKesson's acts and omissions during and after the representation. Austin appeals from the judgment of dismissal entered after the trial court sustained McKesson's demurrer without leave to amend.

Austin argues the court exceeded its jurisdiction in sustaining the demurrer without leave to amend and dismissing the action because when McKesson filed the demurrer, McKesson was in default. But though Austin *requested* entry of default, there is no evidence in the record that the clerk filed or acted upon his request. Because default was never entered against McKesson, the court had jurisdiction to rule on the demurrer. We therefore affirm the judgment.

PROCEDURAL BACKGROUND

On March 18, 2015, Austin filed the complaint in the present case. Although the record on appeal does not contain a copy of the complaint, it appears it alleged one cause of action for breach of contract for legal malpractice and two causes of action for fraud based on legal malpractice and elder abuse. On April 17, 2015, the court issued an order to show cause for failure to file a proof of service of the summons and complaint. On May 5, 2015, Austin filed an application for extension of time to serve McKesson. On June 18, 2015, Austin filed the summons, and,

after a series of continuances, on November 9, 2015, he filed the proof of service of the summons and complaint, which a Los Angeles County Sheriff's deputy had served by mail on September 17, 2015.[1]

On January 6, 2016, Austin mailed an application for entry of default and default judgment to the court. (See *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106 [prison delivery rule].) In in his request for entry of default judgment against McKesson, Austin sought more than $540,000 in damages. The clerk stamped the application "received" on January 11, 2016. Based on the record before us, however, it appears the clerk did not file the application, reject the application, notify Austin that his application had not been filed, or give Austin a chance to cure any deficiencies. (See Super. Ct. L.A. County, Local Rules, rule 3.200 [defective request for entry of default may be cured; if the defect cannot be cured to the clerk's satisfaction, ex parte relief may be obtained from the judge].)

The court held a case management conference on January 15, 2016. According to the minute order of that date, the court found that Austin had filed the proof of service of the complaint on November 9, 2015. Defense counsel represented that the "documents referenced" had not been received.[2] The court continued the case management conference to April 14, 2016, and

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[1] Only this last document is part of the record on appeal.

[2] The nature of the "documents referenced" is unclear from the court's minute order—i.e., whether counsel claimed McKesson had not received the complaint and summons or whether he claimed McKesson had not received a copy of the proof of service filed with the court on November 9, 2015.

set "an Order to Show Cause Re Entry of Default and/or Answer" for the same date.

On March 15, 2016, McKesson demurred to all causes of action. He reserved a hearing date of April 13, 2016, the day before the order to show cause hearing.

On March 27, 2016, Austin mailed a motion to strike the demurrer as untimely. Among other things, the motion noted that Austin had "filed a Request For Entry of Default on or about 1/15/16." Apparently believing the court had filed that application and acted upon it by entering default against McKesson, Austin asked the court to enter judgment in his favor for all causes of action except attorney malpractice, which he asked the court to strike or stay. The clerk stamped the document "received" on April 5, 2016. Again, the clerk did not file the motion, reject the motion, notify Austin that his motion had not been filed, or identify any deficiencies.

On March 27, 2016, Austin also mailed a request for judicial notice in support of his opposition to McKesson's demurrer. The request asked the court to take judicial notice of a pending federal habeas corpus action in which Austin challenged the criminal convictions underlying his malpractice cause of action. No records from the federal case were attached to the request. Since the clerk's transcript contains a copy of the request for judicial notice alongside the other document mailed the same day, the court apparently received it. But, as with the application for entry of default and default judgment, and the motion to strike, the clerk did not file the request, reject the request, or notify Austin that his request had not been filed. Unlike the earlier attempted filings, however, this one was not stamped

received, and it never made its way to the judge presiding over the matter.

On March 30, 2016, Austin mailed his opposition to McKesson's demurrer. The document was filed on April 7, 2016. On April 13, 2016, the court sustained McKesson's demurrer without leave to amend and vacated the order to show cause regarding entry of default.

On August 1, 2016, Austin filed an application to vacate the court's order sustaining the demurrer without leave to amend. On September 1, 2016, the court issued a tentative ruling, took the application under submission, and ordered the parties to file written responses.

On October 17, 2016, the court denied Austin's motion to vacate. A judgment of dismissal was entered on December 15, 2016, and Austin filed a timely notice of appeal.

DISCUSSION

Austin contends the court exceeded its jurisdiction when it sustained McKesson's demurrer without leave to amend and entered a judgment of dismissal.

1. The record on appeal is inadequate for review.

It is well settled that "[a]ppealed judgments and orders are presumed correct, and error must be affirmatively shown." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502, citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) As the party challenging the court's presumably correct findings and rulings, Austin is required "to provide an adequate record to assess error." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Certainly, we are mindful that Austin is incarcerated and representing himself on appeal. His

status as a party appearing in propria persona, however, does not provide a basis for preferential consideration. A self-represented party is to be treated like any other party, and is entitled to the same—but no greater—consideration than other litigants and attorneys. (See *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125.)

In this appeal, Austin elected to proceed on an incomplete record. For example, we do not have a copy of the operative pleading or a reporter's transcript or suitable substitute of the demurrer hearing or any other proceeding. Without these documents, we cannot determine whether any ground of the demurrer is well-taken or whether leave to amend should have been granted by the court. (See *Gee v. American Realty & Construction, Inc*. (2002) 99 Cal.App.4th 1412, 1416 [if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court must be affirmed].) Nonetheless, we address below Austin's argument that the court had no jurisdiction to rule on McKesson's demurrer after McKesson had been defaulted.

2. There was no entry of default.

There are two key procedural events in a default proceeding: the entry of default and the entry of default judgment. Here, we are concerned with the first step of this process, where, upon a plaintiff's proper application and proof of service of the summons and complaint, the clerk of the court will enter the default of a defendant that has failed to respond to the plaintiff's complaint within the time allowed. (Code Civ. Proc., §§ 585, subds. (a)–(c), 586, subd. (a).) And we agree with Austin that entry of a default by the clerk terminates a defendant's rights to take any further affirmative steps in the litigation until

either its default is set aside or a default judgment is entered. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385–386.) But Austin's arguments rest on the erroneous premise that the clerk in this case entered a default against McKesson.

For example, Austin writes that the "Clerk initially *entered* respondent's default on 1-11-15. It was recognized by the court on 1/15/16 when it issued an order to show cause why judgment should not be entered." (Italics added.) Austin later writes that McKesson was "declared in default on 1/15/16 with the OSC … ." In fact, neither the clerk nor the court entered default against McKesson.

The clerk stamped the request for entry of default "received" on January 11, 2016. But the clerk did not *enter* default on that date. We know this based on the face of the form itself. Austin used mandatory judicial council form CIV-100. At the bottom of the first page, that form contains a box labeled "FOR COURT USE ONLY." Inside are a signature line and two check boxes that allow the deputy clerk to note the action he or she takes on a request. Option one is "Default entered as requested on (*date*)." Option two is "Default NOT entered as requested (*state reason*)." On Austin's application for entry of default, the clerk neither selected one of these options nor signed the form. Thus, while Austin's application for entry of default was received, the clerk did not enter default against McKesson.[3]

Austin also misapprehends the nature of the court's order to show cause. An order to show cause is an "order directing a

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[3] The record does not show that Austin cured any defect in his application for entry of default or that he sought ex parte relief from the judge. (See Super. Ct. L.A. County, Local Rules, rule 3.200.)

party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not grant some relief." (Black's Law Dict. (4th pocket ed. 2011) p. 544.) Thus, when the court issued an "Order to Show Cause Re Entry of Default," the court was directing McKesson to "appear in court and explain … why the court … should not" enter default against him. (*Ibid*.) This was not, as Austin claims, an order to show cause regarding entry of default *judgment*.

A defendant may file a belated responsive pleading up to the time default is entered. (*People v. One 1986 Toyota Pickup* (1995) 31 Cal.App.4th 254, 259–260.) And here, McKesson filed the demurrer before the hearing on the order to show cause for entry of default. That is, McKesson filed a responsive pleading *before* the hearing at which the court planned to consider whether to enter a default against him.

Because McKesson was never in default, the court retained jurisdiction to rule on the demurrer.

DISPOSITION

The judgment is affirmed. In the interest of justice, the parties shall bear their own costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.